IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1352 of 2007
With
SPECIAL CRIMINAL APPLICATION No. 1353 of 2007
With
SPECIAL CRIMINAL APPLICATION No. 1354 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIJAYBHAI MALABHAI BHARWAD & 2 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MS SONAL R SHAH for Applicant(s) : 1 - 3.
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
RULE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 01/08/2007

COMMON ORAL JUDGMENT

1. As in all these Special Criminal Applications common question of law and facts arise and the same are arising out of one common FIR being I

CR No. 281 of 2007, these petitions are being disposed of by this common judgment and order.

2. At the outset, it is to be noted that earlier respective petitioners – original accused preferred Criminal Revision Application Nos. 200/2007, 206/2007 and 219/2007, however, subsequently, when all these Criminal Revision Applications came up for hearing before the learned Single Judge (Coram: Mr. M.D.Shah, J.), the learned Single Judge was of the opinion that the orders impugned in the said Criminal Revision Applications are of interlocutory nature. Shri Y.N.Oza, learned Senior Advocate appearing on behalf of the respective petitioners sought permission to convert the said Criminal Revision Applications into the Special Criminal Applications and considering the said request, an order came to be passed to convert all the said Criminal Revision Applications into Special Criminal Applications and that is how these Special Criminal Applications are registered as Special Criminal

Application Nos.1352 of 2007, 1353 of 2007 and 1354 of 2007.

3. Few facts leading to the present Special Criminal Applications in nutshell are as under:-

That a criminal complaint has been registered / lodged with Umra Police Station, Surat against the present accused persons being I CR No.281 of 2007 initially for the offences punishable under sections 395, 326, 323, 506(2), 143, 147, 149, 120(B), 34 and 188 of the IPC. That the said complaint was lodged before the Umra Police Station, Surat on 5.4.2007 at 11.00 p.m. and the first information was given to the Police Inspector at 11.00 p.m. on 5.4.2007 and to the P.S.O., Umra Police Station at 11.30 a.m. on 5.4.2007. On receiving the information, the Investigating Officer / Police Inspector, Umra Police Station started the investigation and on the next day itself i.e. on 6.4.2007, the Investigating Officer also came to know that approximately 70 to 80 persons came in different

vehicles; attacked the security personnels and used deadly weapons and caused the injuries to the persons named in the FIR and subsequently they have run away and therefore, as per the Investigating Officer sections 397 and 447 is to be added in the complaint and the investigation is also to be made for the offence under sections 397 and 447 of the IPC as well as section 25(1)(A)(B) of the Arms Act therefore, the Police Inspector, Umra Police Station reported to the learned Chief Judicial Magistrate, Chief Court, Surat for adding sections 397 and 447 of the IPC and section 25(1)(A)(B) of the Arms Act in the complaint and the learned 2nd Additional Senior Civil Judge & Chief Judicial Magistrate, Surat by order dated 6.4.2007 passed an order "***TO BE KEPT WITH FIR***." That during the course of the investigation, the concerned Investigating Officer was also of the opinion that offences under section 326 is also made out and therefore, he sent the report to the learned Chief Judicial Magistrate, Surat on 11.4.2007 for continuing the offence under

section 326 of the IPC and the learned Chief Judicial Magistrate, Surat passed an order on 11.4.2007 "***KEPT WITH FIR***." During the course of the investigation, the Investigating Officer found that 36 persons named in the report dated 6.4.2007 (petitions of Special Criminal Application No. 1354 of 2007) have also committed the offence and they were the part of the mob and they were arrested on 6.4.2007 and therefore, after arrest, the Investigating Officer, Umra Police Station reported to the learned Chief Judicial Magistrate with regard to their arrest and to take them in the judicial custody and all those persons were produced before the learned Chief Judicial Magistrate, Surat and on production of all those accused before him, after ascertaining as to whether there is any complaint against the police officer or not, passed an order to take those accused into judicial custody on 6.4.2007.

4. Being aggrieved and dissatisfied with the report submitted by the Investigating Officer, Umra

Police Station dated 6.4.2007 reporting the concerned learned Chief Judicial Magistrate, Surat for adding offences under sections 397 and 446 of the IPC and section 25(1)(A)(B) of the Arms Act and being aggrieved and dissatisfied with the order passed by the learned Chief Judicial Magistrate, Surat in passing the order "KEPT WITH FIR," the petitioners – original accused have preferred Special Criminal Application No. 1352 of 2007.

Being aggrieved and dissatisfied with the report submitted by the Investigating Officer of Umra Police Station dated 11.4.2007 to continue section 326 of the IPC in the complaint and the order passed by the learned Chief Judicial Magistrate "TO BE KEPT WITH FIR," the petitioners – original accused have preferred Special Criminal Application No.1353 of 2007.

That Being aggrieved and dissatisfied with the report submitted by the Investigating Officer, Umra Police Station dated 6.4.2007 intimating

the learned Chief Judicial Magistrate with regard to arrest of the accused persons and thereafter learned Chief Judicial Magistrate taking all those accused persons into judicial custody, the petitioners – original accused, who were arrested subsequently on 6.4.2007 have preferred Special Criminal Application No. 1354 of 2007.

5. Shri Y.N.Oza, learned Senior Advocate appearing on behalf of the petitioners of Special Criminal Application No. 1352 of 2007 and Special Criminal Application No. 1353 of 2007 has vehemently submitted that without putting forth any specific reasons or case for inclusion of sections 394 and 447 of the IPC along with section 25(1)(A)(B) of the Arms Act the sections have been included in the FIR to make case look so grave and thereby to put the petitioners in serious difficulties. It is further submitted by him that the learned trial Court without any application of mind; without issuing any notice to the accused and even without following any

due procedure of law, has passed one line order "TO BE KEPT WITH FIR" thereby permitted the inclusion of the said grave sections in the FIR without assigning any reasons and hence, the impugned order to the extent of inclusion of sections 397 and 447 of the IPC and section 25(1)(A)(B) of the Arms Act and also section 326 of the IPC is bad in law and the same deserves to be quashed and set aside. It is submitted by Shri Oza, learned Senior Advocate that the learned trial Court has passed the impugned order without assigning any reason and the order has been passed by the learned trial Court mechanically. It is submitted that the said order is one line order, which does not give any details as to why such grave sections are permitted to be added in the FIR. It is submitted that on bare perusal of the FIR or even on reading of the said police report, nowhere can the said section be attributed to the present petitioners. It is submitted that both the sections do not have any applicability or nexus to the alleged act as stated in the

complaint. It is also further submitted that no case is made out for the offences under sections 397, 447 and 326 of the IPC and section 25(1)(A)(B) of the Arms Act. It is submitted that no case is made out for robbery and therefore, the learned trial Court has committed an error in permitting the Investigating Officer to add the aforesaid sections in the FIR. It is submitted by Shri Oza, learned Senior Advocate that it is mandatory requirement under the law that the learned trial Court before passing the impugned order, is required to issue process / notices to the accused and after giving them proper opportunity of hearing and after scrutinizing and investigating in detail into the grounds put forth in the police report by the police agency, was required to pass any order whereas in the present case none of the above has been done by the learned trial Judge. It is submitted by him that when such grave and serious sections were supposed to be incorporated, before passing the impugned order, opportunity of hearing ought to have been given to the accused of the present

complaint. It is submitted that however the learned trial Judge mechanically accepted the report of the investigating agency without any application of mind as is evident from the fact that the impugned order is one line order and therefore, the same requires to be quashed and set aside. It is also further submitted by him that the learned trial Court has miserably failed to appreciate the facts that the complainant of the said FIR is the employee of the person, who himself has a criminal record and therefore, the same would establish how notorious and antisocial elements, who have lodged the said complaint. It is submitted that for this reason also, it was the bounden duty of the learned trial Court to investigate in detail into the police report and given an opportunity to the petitioners – original accused before incorporating such a grave sections.

6. It is also further submitted by Shri Oza, learned Senior Advocate that the learned trial Court has failed to appreciate that before

lodging of the said complaint, petitioner No.3 had filed a complaint dated 31.3.2007 before the Police Commissioner, Surat against notorious elements of the brothers who were illegally trying to snatch away the possession of the lands and the police did not lodged the complaint and instead as a counter blast false complaint has been filed against the petitioners at the behest of the notorious elements and by incorporating such grave sections have tried to rope the petitioners. It is submitted that if the opportunity would have been given to the petitioners by the learned trial Court before passing the said impugned order, the petitioners could have pointed out the same. It is submitted that the petitioners have also preferred Special Criminal Application No. 1299 of 2007 before this Court for transfer of the investigation and therefore, the report submitted by the Investigating Officer, Umra Police Station and the impugned order passed by the learned trial Court "***TO BE KEPT WITH FIR***" requires to be quashed and set aside.

7. Shri Y.N.Oza, learned Senior Advocate appearing for the petitioners of Special Criminal Application No. 1354 of 2007 has submitted that as all these petitioners are falsely implicated in the case and are falsely roped in the case, the learned trial Court has materially erred in accepting the report of the Investigating Officer in adding the names of the accused that too without giving opportunity to the petitioners. It is submitted that the learned trial Court has grossly erred in mechanically accepting the police report dated 6.4.2007 with regard to arrest of the petitioners and sending the petitioners to the judicial custody. It is submitted that it is bounden duty and mandatory duty of the Investigating Officer to show concrete prima facie evidence and reasons to arrest. It is submitted that in the present case the learned trial Court has not even initiated any exercise to verify as to whether the present petitioners who were arrested and then presented before the learned trial Court were actually

even prima facie involved in the alleged offence or not. It is submitted that none of the petitioners have committed any offence as alleged and therefore, report dated 6.4.2007 and the order passed by the learned trial Court dated 6.4.2007 taking the petitioners into the judicial custody requires to be quashed and set aside.

8. Shri Y.N.Oza, learned Senior Advocate has relied upon the following decisions in support of the present petitions and their prayers.

(I) In case of ***Pepsi Food Ltd., & Another V/s. Special Judicial Magistrate & Others*** reported in **(1998) 5 SCC 8749 Para – 28.**

(II) In case of ***Siemens Engineering & Manufacturing Co. of India V/s. Union of India & Others*** reported in **(1976) 2 SCC 981 Para – 6.**

(III) In case of ***Sureshkumar Gupta V/s. State of Gujarat*** reported in **1998 (1) GLR 327 Paras – 10, 12, 14.**

(IV) In case of ***Mahendra Mills Ltd., & Others***

V/s. State of Gujarat & Another reported in **1992 GLH 686.**

(V) In case of ***Swami Mick Monassan V/s. Popatlal*** reported in **1983 (1) GLR 185 Paras – 26 and 27.**

(VI) In case of ***B. Ramesh & Others V/s. State of Gujarat*** reported in **1997 (2) GLR 1955 Para – 4.**

9. All these petitions are opposed by Shri R.C.Kodekar, learned APP appearing on behalf of the State. It is submitted that the learned trial Court has simply passed an order to keep the report / intimation with regard to adding sections in the FIR - "***TO BE KEPT WITH FIR***" and at that stage the petitioners – original accused are not required to be heard. It is submitted that it is the statutory right of the Investigating Officer to investigate the case and during the course of the investigation, as and when it is found that the particular offence is also made out, then in that case, the concerned Investigating Officer is required to intimate to the concerned Judicial Magistrate

the Investigating Officer has simply reported to the learned Chief Judicial Magistrate that a case under sections 397, 447 and 327 of the IPC and under section 25(1)(A)(B) of the Arms Act is also made out, so that after the investigation the Investigating Officer can further investigate the said case. It is further submitted that at that stage the accused are not required to be heard. It is submitted that the accused are required to be heard only after the investigation is completed and the report is made / charge-sheet is filed under section 169 of the Criminal Procedure Code and the charge is framed. It is submitted that under the Code of the Criminal Procedure, there is no requirement of giving any opportunity to the accused till an appropriate report is submitted by the Investigating Officer and the charge is framed against the accused. Under the circumstances, it is requested to dismiss all these Special Criminal Applications. It is submitted by him that it appears that the learned advocate appearing on behalf of the petitioners is mixing

the report / intimation to the concerned Magistrate for adding sections and the report after investigation under section 169 of the Criminal Procedure Code and/or adding the charge after the report. It is submitted that the present report / intimation is distinguish than the report under section 169 of the Criminal Procedure Code. Therefore, it is requested to dismiss the present Special Criminal Applications.

10. In support of his above submissions, learned APP Shri R.C.Kodekar, has relied upon the following decisions.

(I) In case of ***State of West Bengal V/s. S.N.Basak*** reported in **AIR 1963 Supreme Court 447.**

(II) In case of ***S.N.Sharma V/s. Dipen Kumar Tiwari & Others*** reported in **AIR 1970 Supreme Court 786.**

(III) In case of ***S.M.Dutta V/s. State of Gujarat & Another*** reported in **AIR 2001 Supreme Court 3253.**

11.Shri R.C.Kodekar learned APP has also further submitted that so far as Special Criminal Application No. 1354 of 2007 is concerned as the petitioners were arrested during the investigation and during the investigation it has come out that the petitioners are also involved and therefore, considering the provisions of the Criminal Procedure Code an intimation was given to the learned Chief Judicial Magistrate with regard to their arrest and to take them into judicial custody and the learned trial Court has taken them into judicial custody and at that time, the accused are not required to be heard and there is no such requirement under the provisions of the Criminal Procedure Code. Therefore, it is submitted that when on arrest the petitioners are taken into judicial custody, it cannot be said that there is any illegality committed by the learned trial Court.

12.Heard the learned advocates appearing on behalf

of the respective parties.

13. Considering above it emerges from the record that a complaint being I CR No. 281 of 2007 is lodged with Umra Police Station, Surat initially for the offences punishable under sections 395, 326, 323, 506(2), 143, 147, 149, 120(B), 34 and 188 of the IPC and the said complaint was filed on 5.4.2007 at 11.30 p.m. That in the said complaint, two accused were named and it was also stated in the complaint that there were other 70 to 80 persons, who have attacked and committed the offence. That on 6.4.2007 i.e. on the next day itself, after the Investigating Officer took the investigation on hand, the Investigating Officer was of the opinion that the offence under section 397 and 447 of the IPC and section 25(1)(A)(B) of the Arms Act are also seems to have been committed and therefore, he reported to the concerned learned Judge for adding the said sections and the learned Chief Judicial Magistrate has passed an order "***TO BE KEPT WITH FIR***." The intimation / report by the

Investigating Officer to the concerned learned Judge is with a view to enable the Investigating Officer to further investigate the offence under sections 397 and 447 of the IPC r.w. Section 25(1)(A)(B) of the Arms Act. There is no such provision under the Code of the Criminal Procedure to give an opportunity by the learned Magistrate and to hear the accused at that stage as it cannot be said that it is adding the charge. There is a distinction between the report at the initial stage to add the sections / offences in the FIR and the report after investigation by the Investigating Officer as provided under section 169/173 of the Criminal Procedure Code. Under the provisions of the Criminal Procedure Code and looking to the scheme of the Code, till the charge-sheet is filed and the charge is framed, there is no requirement of hearing and/or giving an opportunity of hearing to the accused persons. Till then, it is the statutory right of the Investigating Officer to investigate the case and Investigating Officer is the master of

investigation. Under the circumstances and considering the scheme of the Criminal Procedure Code, the contention on behalf of the petitioners – original accused that at the time of report by the concerned Investigating Officer adding the sections in the FIR and at the time of passing an order by the learned trial Court - "***TO BE KEPT WITH FIR***", the accused are required to be heard cannot be accepted. By adding the sections in the FIR and passing the order by the learned Magistrate "TO BE KEPT WITH FIR" no prejudice will be caused to the accused. The bail applications are required to be considered on its own merits looking to the material available during the course of the investigation and therefore, merely because the sections are added, it cannot be said that any prejudice will be caused to the accused.

14. So far as the contention on behalf of the petitioners – original accused that at the time of considering the report adding the sections the learned trial Court is required to apply his

mind while accepting the said report and is required to give an opportunity to the accused and is not required to mechanically accept the report of the Investigating Officer is concerned, it appears that there is some misconception on the part of the petitioners. As stated above, report / intimation adding the sections in the FIR is a distinct report than the final report after investigation as provided under section 169/173 of the Criminal Procedure Code. At that stage, after the investigation is over and the final report is submitted, the learned Magistrate is required to apply his mind as to whether the report submitted by the Investigating Officer is to be accepted or not and at that time, he is required to consider the material available after investigation. However, there is no such requirement under the Code at the time of submission of intimation / report by the concerned Investigating Officer to add the sections in the FIR. Under the circumstances, all the decisions relied upon by the Shri Oza, learned Senior Advocate appearing for the

petitioners are not applicable to the facts of the present case and the stage at which they are sought to be applied. In all those decisions the question was with regard to whether at the time of considering the final report after investigation whether the learned Magistrate is required to apply his mind or not and / or whether he is to mechanically accept the same or not. In none of the said decisions it is held that at the time of adding the sections in the FIR, either the accused are required to be heard or the learned Magistrate is required to apply his mind at the time of accepting the said report. As stated above, initially the report / intimation with regard to adding the sections and the offences shall not be confused and/or compared with the final report under section 169/173 of the Criminal Procedure Code.

15. By the report / intimation to add the sections 397, 447 and 326 of the IPC r.w. section 25(1)(A)(B) of the Arms Act is for the purpose of Investigating Officer to investigate into the

said cognizable offences also and after the information with regard to the cognizable offence as provided under section 154 of the Criminal Procedure Code, under section 156 of the Criminal Procedure Code, the police has a statutory right to investigate into the circumstances of any cognizable offence without even any authority from the Magistrate and the said statutory powers of the police to investigate cannot be interfered with. The powers of police to investigate in cognizable offence is uncontrolled by the Magistrate and it is only in cases where the police decides not to investigate the case that the Magistrate can intervene and either direct an investigation or in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to inquire into the case. The Code does not contain any other provision giving powers to Magistrate to stop investigation by the police. As stated above, at the time of investigation of a cognizable offence the accused has no say till the appropriate report is submitted and the

charge-sheet is filed and the charge is framed. The scheme of the Code does not envisage any hearing to be given to the accused. During the course of the investigation and before final report is submitted if during the course of the investigation it is found that certain other persons were also involved, who have also committed the offence, they can also be joined as an accused, however, after the arrest considering the provisions of the Criminal Procedure Code, the Investigating Officer has to intimate to the concerned Magistrate with regard to their arrest and to take them into the judicial custody and under the provisions of the Criminal Procedure Code the concerned Investigating Officer has to produce the accused before the learned Magistrate within 24 hours and if the police remand is not required than all those accused are to be sent to the judicial custody unless they are released on bail. That is exactly what the learned trial Court has done by passing order on 6.4.2007 when accused persons were produced before the learned Chief

Judicial Magistrate after arrest by the Investigating Officer and they were taken into judicial custody. At that stage also, the accused are not required to be heard except on the point whether there was any ill treatment by the Investigating Officer or not. After the arrest and the intimation by the Investigating Officer and when the accused are taken into judicial custody at that stage accused are not required to be heard except on application for bail. Under the circumstances, the contention on behalf of the respective petitioners – original accused that at the time when they were taken into judicial custody and they were arrested as accused on the report dated 6.4.2007, they were required to be heard and / or at that stage the learned trial Court is required to apply his mind as to whether there is any case made out against the accused persons or not, cannot be accepted and there is no such requirement under the Code.

16.At this stage to grant the stay of the report

submitted by the concerned Investigating Officer to add sections 397, 447 and 326 of the IPC r.w. section 25(1)(A)(B) of the Arms Act and / or to quash and set aside the said report would be restraining the police officer from investigating the disclosed offences of the the said sections, which is not permissible, more particularly, in view of the fact that the quashing applications submitted by the respective petitioners were dismissed by this Court as withdrawn, which were filed by the respective petitioners under section 482 of the Criminal Procedure Code to quash the impugned FIR.

17. The sum and substance of the above discussion is that at the time of initial report / intimation by the Investigating Officer to the concerned Magistrate adding the sections of the offence the accused are not required to be heard and the learned Magistrate is not required to consider any other things till the final report is submitted after conclusion of the

investigation by the Investigating Officer and only at that stage, the concerned learned Magistrate has to apply his mind as to whether to accept the said report or not and there is a distinction between the report adding sections in the FIR at the initial stage and final report after conclusion of the investigation as contemplated under section 169/173 of the Criminal Procedure Code onwards. Till the charge-sheet is filed and the charge is framed, the accused have no locus and they are not required to be heard. During the course of the investigation if some accused are arrested and they are also added as accused in the FIR and when they are produced before the learned Magistrate and they are taken into judicial custody at that stage, neither the accused are required to be heard nor the learned Magistrate is required to apply his mind and is not required to consider as to whether any case is made out against those persons / accused. Under the circumstances, the learned trial Court has not committed any error and/or illegality and/or

acted contrary to the provisions of the Criminal Procedure Code while passing the order on the report submitted by the Investigating Officer to add certain sections in the FIR - "***TO BE KEPT WITH FIR***" and while taking the petitioners – original accused of Special Criminal Application No. 1354 of 2007 into judicial custody.

18. It is required to be noted and as stated above, even the applications submitted by the petitioners for quashing the FIR is also dismissed as withdrawn. Thus, even the petitioners have also tried to get the FIR quashed but they have failed in their attempt.

19. For the reasons stated above, all the petitions are required to be dismissed and are accordingly, dismissed. Rule is discharged. Ad-interim relief granted earlier stands vacated forthwith.

[M.R.Shah, J.]

FURTHER ORDER

At this stage, Shri Y.N.Oza, learned Senior Advocate has requested to continue the interim relief granted earlier. Considering the facts and circumstances of the case and the view taken by this Court, any stay will further hamper the investigation. Hence, prayer to extend the interim relief is refused.

[M.R.Shah, J.]

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